Supreme Court, U.S.
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No. 84-1554

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
*Petitioner,*

v.

CLIFFORD W. CARRIER,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED MAR. 29, 1985**
**CERTIORARI GRANTED JULY 1, 1985**

BEST AVAILABLE COPY

21 pp

The following opinions and judgments, portion of brief, order, and statute involved have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

En Banc Opinion of the United States Court of Appeals for the Fourth Circuit, in *Carrier v. Hutto*, No. 83-6039 (February 7, 1985) ..... App. 1

Opinion of the United States Court of Appeals for the Fourth Circuit, No. 83-6039 (December 27, 1983) ..... App. 3

Portion of Brief of Clifford W. Carrier, filed in the United States Court of Appeals for the Fourth Circuit, No. 83-6039 ..... App. 23

Order of the United States District Court for the Eastern District of Virginia, Norfolk Division, in *Carrier v. Hutto*, No. 80-1041-N (October 15, 1982) ..... App. 26

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Order of the Supreme Court of Virginia in *Carrier v. Commonwealth* (Direct Appeal), Record No.771546 (April 27, 1978) ..... JA-4

Motion for Appointment of Counsel and Rebuttal filed by Clifford W. Carrier in the Circuit Court of the City of Virginia Beach, Virginia (State Habeas Corpus Proceeding) (February 1, 1980) ..... JA-5

Order of the Supreme Court of Virginia in *Carrier v. Mitchell* (Habeas Corpus Appeal), Record No. 800472 (June 12, 1980) ..... JA-7

Motion of Objection and Exception filed by Clifford W. Carrier in the United States District Court for the Eastern District of Virginia, Norfolk Division, in *Carrier v. Hutto* (Federal Habeas Corpus Proceeding), No. 80-1041-N (October 18, 1982) ..... JA-8

Order of the Supreme Court of Virginia in *Turner v. Morris*, Record No. 820828 (January 11, 1983) .... JA-13

Excerpt from Brief of Appellee filed in the United States Court of Appeals for the Fourth Circuit ..... JA-15

Section 8.01-654, Code of Virginia ..... JA-17

## DOCKET ENTRIES

### STATE COURT RECORD

December 6, 1976—Indictments (Rape-Abduction-Maiming).

November 22, 1976—Motion for Discovery and Inspection.

January 24, 1977—Response to Motion for Discovery.

January 27, 1977—Letter dated January 26, 1977.

February 2, 1977—Letter to Court dated February 2, 1977.

February 7, 1977—Motion.

February 9, 1977—Letter from Court to Counsel.

March 21, 1977—Order (Pertaining to Discovery).

March 28, 1977—Order (Maiming-Dismissed on Motion).

June 22, 1977—Order (Judgment and Sentencing-Rape).

June 22, 1977—Order (Judgment and Sentencing-Abduction).

July 19, 1977—Order (Appointing Counsel to Perfect Appeal).

July 20, 1977—Notice of Appeal and Assignments of Error.

April 27, 1978—Order of Virginia Supreme Court (Refusing Appeal).

January 8, 1979—Order of United States Supreme Court (Denying Petition for Certiorari).

December 27, 1979—Petition for Writ of Habeas Corpus, Circuit Court of Virginia Beach, Virginia.

January 11, 1980—Motion to Dismiss filed by Commonwealth.

February 1, 1980—Motion for Appointment of Counsel and Rebuttal filed by Carrier.

February 5, 1980—Order (Dismissing Habeas Corpus Petition).

February 19, 1980—Notice of Appeal and Motion for Leave to Proceed in Forma Pauperis.

February 19, 1980—Order (Denying Appointment of Counsel and Transmitting Record to the Virginia Supreme Court).

June 12, 1980—Order of Virginia Supreme Court (Refusing Appeal).

**FEDERAL HABEAS RECORD**

September 19, 1980—Petition for Writ of Habeas Corpus, United States District Court for the Eastern District of Virginia, Norfolk Division.

September 29, 1980—Order (Filing Petition in Forma Pauperis).

October 2, 1980—Motion to Dismiss on Behalf of the Respondent.

November 13, 1980—Order (Directing Respondent to File Answer).

November 21, 1980—Brief in Opposition to Motion to Dismiss.

November 26, 1980—Answer.

December 11, 1980—Affidavit and Motion to Strike.

December 11, 1980—Motion for Appointment of Counsel and Evidentiary Hearing.

March 26, 1982—Supplement to Answer.

August 31, 1982—Magistrate's Report and Recommendation.

October 18, 1982—Motion of Objection and Exception.

October 19, 1982—Order (Denying and Dismissing Petition).

October 19, 1982—Judgment Entered.

November 1, 1982—Notice of Appeal.

January 18, 1983—Certificate of Probable Cause Granted, United States Court of Appeals for the Fourth Circuit.

December 27, 1983—Opinion of the United States Court of Appeals for the Fourth Circuit.

May 22, 1984—Order (Granting Rehearing En Banc).

February 7, 1985—En Banc Opinion of the United States Court of Appeals for the Fourth Circuit.

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY THE 27TH DAY OF APRIL, 1978.

CLIFFORD W. CARRIER,

*Appellant,*

AGAINST

COMMONWEALTH OF VIRGINIA,

*Appellee.*

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**Record No. 771546**
**Circuit Court No. D-4489**

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**FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH**

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

(Certificate and costs omitted in printing.)

(Please note: The following pleading is set forth verbatim.)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CLIFFORD W. CARRIER,

*Petitioner*

-V-

J.P. MITCHELL, WARDEN
VIRGINIA STATE PENITENTIARY,

*Respondent.*

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**At Law L-8931-A**

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## MOTION FOR APPOINTMENT OF COUNSEL AND REBUTTAL

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Comes now Clifford W. Carrier, in pro-se, and moves this court to deny respondents motion to dismiss. Petitioner gives the following support of his allegations as follows:

1. Petitioner admits to 1 & 2 in respondents motion, but abjects to 3, 4 & 5.

2. Petitioner offers in support of his allegation of the Commonwealth witholding statement made by the prosicution's wittness Diane Lewis, that this is newly discovered evidence (See Exhibit I). Petitioner contends that this is in violation of his 14th Amendment of the Constitution, in the due process clause as refered in the case of *Brady -v- Maryland* 373 - US 83. and as stated in the Constitutional Law

-257 "Suppression by prosecution of evidence favorable to any accused upon request violates due process evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution. XX U.S.C.A. Const. Amend. 14. Petitioner contends that he had no way of properly cross examining this wittness without this statement being made available to him after his request was made. Therefore, harmful error was made and he was denied due process of Law. Petitioner contends that as in the "*Brady*" case the only remedy is that the conviction be set aside and that he be granted a new trial.

3. Petitioner contends that he should not be made to document all his claims without benifit of counsel, and request that counsel be appointed so that he may produce a more colorable claim in this court. Also, that his constitutional rights may further be protected.

WHEREFORE, petitioner prays that this court will deny respondents motion to dismiss, and grant the petition for the writ of habeas corpus and appoint counsel.

Respectfully submitted,

/s/

Clifford W. Carrier, No.

(Jurat omitted in printing.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of June, 1980.

CLIFFORD E. CARRIER,

*Appellant,*

AGAINST

J. P. MITCHELL, WARDEN of the Virginia State Penitentiary,

*Appellee.*

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**Record No. 800472**
**Circuit Court No. L-8931A**

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**FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH**

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

And it is ordered that the Commonwealth recover of the appellant the costs in this court and the court below.

(Certificate and costs omitted in printing.)

(Please note: The following pleading is set forth verbatim.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK, VIRGINIA

CLIFFORD W. CARRIER, No. 112229

*Petitioner*

v.

TERRELL D. HUTTO, Director of the Virginia Department of Corrections.

*Respondent.*

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**CIVIL ACTION**
**NO. 80-1041-N**

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**MOTION OF OBJECTION AND EXCEPTION**

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This action comes as a result of the action taken pursuant to a decision considered and rendered adverserly to the Petitioner in an action under 28 U.S.C. See. 2254. The matter was referred to a United States Magistrate, "James T. Turner, Norfolk, Virginia" by order of Provisions 28 U.S.C. See. 636 (b) (1) (b) and (c) and Rule 29 (a) (1) and (n) (3) (f) of the Rules of the United States District Court for the Eastern District of Virginia.

Comes now your Petitioner, Clifford W. Carrier, no. 112229, in the case of *Clifford W. Carrier* vs. *Terrell D. Hutto*, Director of the Department of Corrections; case no.

80-1041-n pursuant to 28 U.S.C. See. 636 (b) (1) (c), permitted by Rule 6 (e) of the Federal Rules Civil Procedure.

1. Petitioner is making his Objection and Exception praying that this court will grant your petitioner the relief as sought in his petition for a writ of habeas corpus, which was filed in this court against the lower court for violation of his (petitioner's) Constitutional Rights, which was guaranteed him by the United States Constitution; and present the following as a matter of fact and a matter of record as follows.

2. It is a fact that the petitioner is a convict serving his sentence of forty-five (45) years in the Virginia State Penitentiary, but is presently confined at the *Deerfield Correctional Center in Capron, Virginia.*

3. Petitioner further submits that the Magistrate's Report and recommendations should not be allowed to stand and contends that his case warrants further review of the record by this court.

4. Petitioner alleges that there is evidence which is and was at all times present on the face of the record which will prove that this court does have Authority to grant him the relief as sought in his habeas corpus and appeal filed in the lower court, and which is a matter of record. (See Transcripts of Proceedings) (tr.-Vol.-1-pg.4) and also see: (tr. Vol.-2 pg.151-2), which amounts to the conditions of *Jackson* v. *Virginia*, and or *Jackson* v. *United States*, (1979); which was present at all times at the lower court level, which in the petitioner's case at hand violated the condition of *Jackson* v. *Virginia*, as mentioned.

5. While it may be true and also show on the fact of the record that the petitioner did not directly present his claim as alledged in his habeas corpus directly to the State Su-

preme Court by way of direct appeal, but your petitioner will assure the court by evidence that it was not due to any fault of his, by way of the lower court's records and appeal from that decision, that such actions was the results of eneffective assistance of counsel. See: *Cuyler* vs. *Sullivan*, 446 U.S. 335 (1980).

6. Petitioner was not allowed by his then court-appointed attorney to fully take part in the preparation of his appeal, nor was he allowed to apraise it before it had been filed and denied by the State Supreme Court of Virginia. However, the petitioner stands firm on the cases of *State of Washington* v. *Myer*, 646 F.2d 355(1980-82) and a 4th. Cir, rulings in *Jiminez* vs. *Estelle*, 557 F.2d 506 (1977). Judge Tuttle's Analysis of *Wainwright's* case and prejudice test in Jiminez; also *Bailey* v. *Commonwealth*, 193 Va. 814,71 S.E.2d 368(1952), *Ferguson* v. *Boyd*, 566 F.2d 873(4th.Cir. 1977), which is to support and protect petitioner's position against the *Wainwright* v. *Sykes* case.

7. Petitioner further contends that in order for the Respondent's and the Magistrate's Recommendations to stand or survive against the petitioner's contentions as stated in his habeas corpus, and to deny him (petitioner) the relief sought , the respondents and the magistrate's report cannot simply stand on the contentions of *Wainwright* vs. *Sykes*, as a basis for a denial of petitioner's constitutional rights, which was knowingly violated by the lower court, nor can *Wainwright* vs. *Sykes* case justify such violations which has not as of yet been denied by the respondent, when petitioner's court documentations along with other evidence can prove that such violation did occur and is undenialable. The only way that petitioner can truly prove his contentions is by ordering an evidentiary hearing. See: *Fay* v. *Noia*, 372 U.S. at 439, *Stone* v. *Powell*, 428 U.S. 465 (1976) and *Frazier* v. *Weatherholtz*, 572 F.2d 994 (4th.Cir.1978).

Petitioner is entitled to a evidentiary hearing in order for the state to prove that the respondents have a violate claim of a denial of *Wainwright* v. *Sykes*, in or on the state court level. See. *Humphrey* v. *Cady*, 405 U.S. 904, 517 (1972). The burden is on the state to show that without a doubt the petitioner made a deliberate waiver of his claim in state court.

However, in petitioner's case the petitioner can show by the record that he did properly make his objections to the court, (pre-trial court) and before the bar at trial court. But due to ineffective assistance of counsel during the filing of his appeal, the failure to raise it on direct appeal does not bar either state or federal post-conviction relief. See: *Ferguson* vs. *Boyd*, 566 E.2d 873 (4th. Cir. 1977).

Furthermore, it is contended in as much the contention of the Magistrate's Report is concerned and the finding of fact as to the contemporaneous objection rule, the record see: (tr. Vol. 1 pg. 4) and also (tr. Vol. 2 pg. 151-2). shows that petitioner at his jury trial, and prior thereto see: *Ferguson Supra*, as to *Wainwright*, *Supra*, for further support in conclusion, petitioner cites State of *Washington* vs. *Myers*.

## CONCLUSION

Petitioner states that for the foregoing herein enferred and the facts and laws cited especially the cases of which shows that there was a question as to the Legalizality of his conviction during and prior to his trial, the petitioner prays that this court will further review his case in the light most favorable to the petitioner, since such Constitutionality and due process was denied him at petitioner's trial. See the cases within.

Respectfully Submitted,

/s/

Clifford W. Carrier, No. 112229
Deerfield Correctional Center
Route 1 Box 22
Capron, Virginia 23829

(Jurat omitted in printing.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 11th day of January, 1983.

WILLIE LLOYD TURNER,

*Appellant,*

AGAINST

EDWARD C. MORRIS, SUPERINTENDENT,
MECKLENBURG CORRECTIONAL CENTER,

*Appellee.*

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**Record No. 820828**
**Circuit Court No. CL-195-81 (H.C.)**

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**FROM THE CIRCUIT COURT OF SOUTHAMPTON COUNTY**

Upon review of the record in this case and in consideration of the arguments made in support of and in opposition to the granting of an appeal, and applying the standard of *McMann v. Richardson*, 397 U.S. 759 (1970), and *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied* 435 U.S. 1011 (1978), the court is of opinion that the trial court did not err in dismissing appellant's allegation XII upon a review of the record without taking additional evidence. *Arey v. Payton*, 209 Va. 370, 164 S.E.2d 691 (1968).

And the court is of further opinion that the trial court did not err in dismissing appellant's allegation XVI after review of the record without taking additional evidence. *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982).

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

(Certificate and costs omitted in printing.)

# EXCERPT FROM BRIEF OF APPELLEE TERRELL D. HUTTO FILED IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* * *

Petitioner then admits, *arguendo*, that he is required to first attempt to exhaust his available State remedies in the State courts but asserts that no State court remedy is available because, he claims, any attempt on his part to obtain habeas corpus relief would be futile.[2] His conclusion is based upon the premise that the Virginia Supreme Court only utilizes the "farce-mockery" test in determining issues relating to the effective assistance of counsel.[3] Petitioner points out that this standard was expressly rejected by this Court in *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977).

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[2]In *Slayton*, *supra*, the Court stated at 215 Va. at p. 29, as follows:

> Assuming, without deciding, that petitioner was subject to an unconstitutional identification procedure, the court below erred, *absent a showing of ineffective assistance of counsel in failing to raise that question*, in permitting inquiry on this question for the first time in the habeas corpus proceeding. (Emphasis supplied).

[3]*See*, *Slayton* v. *Weinberger*, 213 Va. 690, 194 S.E.2d 703 (1973).

Petitioner, it is clear, is unaware that the Virginia Supreme Court recently has begun to apply the *Marzullo* standard.[1]

Although this Court in *Crowell, supra*, did not specifically take up the argument that use by the Virginia Supreme Court of the "farce-mockery" test excused failure to attempt to exhaust available State court remedies, this Court did state that if the error complained about was as "apparent" as Petitioner made it out to be, he "could doubtless present a colorable argument claiming that the failure to make the objections to the use of the statements deprived him of the adequate assistance of counsel." (591 F.2d at p. 1259, n. 2).

Petitioner's additional conclusion that the ineffective assistance of counsel could never be shown if the "farce-mockery" standard were utilized in the instant case, again, is without foundation. The only thing that can be said is that the correctness of his conclusion could only be known after *evidence* relating to counsel's conduct was presented in the state courts—and this has not occurred.

* * *

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[1]*See*, Order entered by the Virginia Supreme Court of January 11, 1983, in *Turner* v. *Morris*. This is an unpublished Opinion. Respondent's App. p. A.

## STATUTE INVOLVED

## VIRGINIA CODE

§ 8.01-654. When and by whom writ granted; what petition to contain.

—A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of this Code, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to

be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.